Latitude Tree Furniture Sdn Bhd v Suhaimi bin Husin & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-01(A)-471–12 OF 2017
ABDUL RAHMAN SEBLI, KAMALUDIN MD SAID AND HAS ZANAH MEHAT JJCA
7 AUGUST 2019

Civil Procedure — Judicial review — High Court — Whether High Court unjustified in interfering with Industrial Court's findings of facts — Whether Industrial Court Chairman having seen and heard witnesses giving evidence best placed to assess their credibility and reliability — Whether on evidence Industrial Court correctly decided that misconduct charges against workman had been proven and that his dismissal with just cause and excuse

The appellant dismissed the first respondent ('Suhaimi') from employment after a domestic inquiry found him guilty of four charges of misconduct. Suhaimi had behaved in a physically aggressive manner towards his subordinate, a forklift operator, by pulling the worker off the forklift by his shirt collar and then challenging him to a fight during working hours. This incident was the latest in a series of misconducts Suhaimi was found guilty of committing. Apart from poor attendance at work and poor work performance, he had on two occasions assaulted two of his subordinate workers, one of them while armed with a thick stick. On both those occasions the appellant had suspended Suhaimi from work without pay as punishment and given him a warning that if he repeated such aggressive behaviour in future he would be dismissed immediately. Suhaimi lodged a complaint with the Industrial Relations Department that he had been unfairly dismissed. The Industrial Court ('the IC'), which heard and dismissed Suhaimi's claim, ruled that the appellant had proven the misconduct charges against Suhaimi and that his dismissal was with just cause and excuse. On Suhaimi's application for judicial review of the decision, the High Court quashed the IC's award and held that the evidence did not support the IC's finding that Suhaimi had been physically aggressive to his subordinate. The appellant appealed against the High Court's decision.

Held, allowing the appeal, setting aside the High Court's decision and restoring the IC's award:

(1) There was no justification for the High Court to interfere with the Industrial Court's finding of fact that Suhaimi had acted aggressively towards the complainant and had pulled the latter's shirt collar. On the evidence, the Industrial Court was perfectly entitled to make such a

finding. The finding was not perverse or plainly wrong. Most importantly, the Industrial Court chairman, having seen and heard the witnesses giving evidence was in the best position, as compared to the High Court judge, to assess the credibility and reliability of the witnesses (see paras 26–27).

(2) Although the testimonies of COW2 and COW4 seemed to suggest that no quarrel took place between Suhaimi and the complainant, it had to be remembered that the area where the incident took place was noisy. In any case, COW2 saw Suhaimi pulling the complainant's shirt collar. This was clear evidence of aggression on Suhaimi's part. The probabilities of the case pointed to the fact that Suhaimi was angry with the complainant for not responding to his repeated calls; hence the reason for his aggressive behaviour towards the complainant (see paras 28–29).

(3) By displaying such aggressive behaviour, Suhaimi had clearly breached the appellant's rules and regulations on top of the fact that he had previously been warned not to repeat the offence (see para 31).

[Bahasa Malaysia summary

Perayu telah memberhentikan responden pertama ('Suhaimi') daripada pekerjaan selepas satu sisatan dalaman mendapati dia bersalah kerana empat pertuduhan salah laku. Suhaimi telah bertingkah laku dalam cara fizikal yang agresif terhadap orang bawahannya, seorang pengendali *forklift*, dengan menarik pekerja itu dari *forklift* tersebut dengan memegang kolar kemejanya dan kemudian mencabarnya untuk bergaduh semasa waktu bekerja. Kejadian ini adalah siri terkini salah laku Suhaimi yang didapati bersalah kerana melakukannya. Selain daripada kehadiran yang tidak baik dan prestasi kerja yang tidak baik, dia telah dalam dua kejadian menyerang dua pekerja bawahannya, salah satu daripada mereka dengan memegang kayu yang tebal. Dalam kedua-dua kejadian perayu teah menggantung Suhaimi daripada kerja tanpa gaji sebagai hukuman dan memberikan amaran kepadanya bahawa jika dia mengulangi tingkah laku agresifnya pada masa hadapan dia akan dipecat serta merta. Suhaimi telah membuat aduan dengan Jabatan Perhubungan Perindustrian bahawa dia telah dipecat dengan tidak adil. Mahkamah Perusahaan ('MP'), yang mendengar dan menolak tuntutan Suhaimi, telah memutuskan bahawa perayu telah membuktikan pertuduhan-pertuduhan salah laku terhadap Suhaimi dan bahawa pemecatannya adalah dengan sebab dan alasan yang adil. Berdasarkan permohonan semakan kehakiman Suhaimi terhadap keputusan tersebut, Mahkamah Tinggi telah membatalkan award MP dan memutuskan bahawa keterangan tidak menyokong dapatan MP bahawa Suhaimi telah agresif secara fizikal kepada orang bawahannya. Perayu telah merayu terhadap keputusan Mahkamah Tinggi.

Diputuskan, membenarkan rayuan, mengetepikan keputusan Mahkamah Tinggi dan mengembalikan award MP:

(1) Tiada justifikasi untuk Mahkamah Tinggi campur tangan dengan dapatan fakta Mahkamah Perusahaan bahawa Suhaimi telah bertindak agresif terhadap pengadu dan menarik kolar kemejanya. Berdasarkan keterangan, Mahkamah Perusahaan memang berhak membuat dapatan sedemikian. Dapatan itu tidak salah. Lebih penting, pengerusi Mahkamah Perusahaan, setelah melihat dan mendengar saksi-saksi memberi keterangan berada dalam kedudukan terbaik, jika dibandingkan dengan hakim Mahkamah Tinggi, untuk menilai kredibiliti dan keboleh percayaan saksi (lihat perenggan 26–27).

(2) Walaupun testimoni COW2 dan COW4 dilihat seolah-olah mencadangkan bahawa tidak ada pergaduhan berlaku antara Suhaimi dan pengadu, ia perlu diingati bahawa kawasan di mana kejadian itu berlaku adalah bising. Dalam apa keadaan, COW2 melihat Suhaimi menarik kolar kemeja pengadu. Ini bukti jelas tindakan agresif di pihak Suhaimi. Kebarangkalian kes ini menuding kepada fakta bahawa Suhaimi marah dengan pengadu kerana tidak menjawab panggilannya yang berulang kali itu; justeru sebab tingkah laku agresifnya terhadap pengadu (lihat perenggan 28–29).

(3) Dengan menunjukkan tingkah laku agresif sedemikian, Suhaimi jelas telah melanggar peraturan dan undang-undang lebih lagi pada hakikatnya dia sebelum ini telahpun diberi amaran untuk tidak mengulangi kesalahan itu (lihat perenggan 31).]

Notes

For cases on High Court, see 2(3) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 5974–5984.

Cases referred to

Harianto Effendy Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor [2013] 5 CLJ 733, CA (refd)

Jye Tai Precision Industrial (M) Sdn Bhd v Victoria a/p Arulsamy [2008] 2 MLJ 57; [2008] 1 CLJ 760, CA (refd)

Multimedia Development Corp Sdn Bhd v Clarence Augustine Tee Teck Huo [2018] 3 MLJ 447; [2018] 5 CLJ 570, CA (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1; [2010] 8 CLJ 629, FC (refd)

UMW Equipment Sdn Bhd v Parantaman Ramasamy & Anor [2014] 3 MLJ 457; [2014] 5 CLJ 906, CA (folld)

Legislation referred to

Industrial Relations Act 1967 s 20

Appeal from: Judicial Review Application No WA-25–169–09 of 2016 (High Court, Kuala Lumpur)

Marina Netto (Christy Marina & Assoc) for the appellant.
Auzan Hasanuddin bin Sazali (Marwan Abdullah with him) (Mu'az Aiman Halem Auzan & Assoc) for the respondent.

Abdul Rahman Sebli JCA (delivering judgment of the court):

[1] This appeal was against the decision of the Kuala Lumpur High Court quashing the whole of the Industrial Court's (the second respondent) award dated 24 June 2016 which favoured the appellant factory.

[2] In finding the first respondent's dismissal by the appellant to be with just cause and excuse, it was the Industrial Court's finding that the first respondent 'bertindak agresif seperti mahu bergaduh'. This finding did not find favour with the learned High Court judge, hence her decision to set aside the award. Having heard arguments by both sides, we allowed the appellant factory's appeal by a unanimous decision and restored the Industrial Court's award. These are the grounds of our decision.

[3] The facts are as follows. The record of the human resources department of the appellant factory shows that the first respondent had a string of disciplinary problems, two of which were for serious misconduct. The first instance of serious misconduct was on 10 January 2005 at 11.50am when the first respondent while holding the post of production executive assaulted one Muzaimi bin Mustafa with a stick measuring eight inches long and three inches thick at the workplace. The victim was the line leader in the Rough Mill Department.

[4] For this misconduct, the first respondent was served with a letter of suspension dated 11 January 2005, suspending him for seven days without pay pending investigation. He was later found guilty and was suspended for 14 days without pay from 18 January–2 February 2005. He was also warned not to repeat the offence and that if he did, stern action would be taken against him.

[5] The second instance of serious misconduct was on 9 November 2008 at 8am when the first respondent as head of the seat department punched and injured his subordinate one Talaha bin Mat Niza during a fight with the latter. He was found guilty and suspended for seven days without pay from 15 January–20 November 2008. He was given a final warning that if he

repeated the offence, he would be dismissed immediately. A

[6] Other than being guilty of serious misconduct, the first respondent was also guilty of poor work performance, as follows:

(1) poor work attendance vide letter of reminder dated 28 October 2008 when he was the executive in the IE-PRC department; B

(2) causing losses to the company as a result of poor work performance in his capacity as IE executive;

(3) on 27 November 2011, the first respondent in his capacity as IE executive was served with a reminder letter for his poor performance and was advised to improve; and C

(4) on 28 June 2012, the first respondent in his capacity as the KD cross cut executive was served with a second reminder letter for poor attendance. In this second reminder, the first respondent was severely warned that if he repeated his poor attendance, the company would take disciplinary action to terminate his employment. D

[7] The human resource manager of the appellant factory Norudin bin Mamat gave evidence that he had given counseling sessions to the first respondent after receiving complaints from the first respondent's head of department and other employees in the rough mill department. E

[8] The termination process of the first respondent's employment with the appellant factory was initiated after receiving a verbal complaint from a Bangladeshi by the name of Mansur Md Fazlul Karim (COW1) who worked as a forklift driver in the rough mill department. He was given the task of driving the forklift in the rough mill, the one and only forklift owned by the rough mill department to assist the workers in the department to 'angkat kayu'. F G

[9] The complaint by Mansur was that at about 11.50am during working hours on 10 December 2012 at the KD cross cut section in the rough mill premises, the first respondent pulled his shirt collar to get him to come down from the forklift so that he could use the forklift to stack up the reject wood. The complaint is detailed in Mansur's witness statement, as follows: H

> Sebelum pertengkaran berlaku saya di panggil oleh seorang pekerja bernama Talaha Mat Niza (No: Pekerja 00715) untuk membawa kayu dan semasa pandu forklift, saya dengar Suhaimi panggil saya. Dia marah saya 'kenapa panggil dua, tiga kali tidak mendengar'. Saya berdiam sahaja. Encik Suhaimi terus berkata 'sebab apa lambat'? Saya menjawab 'Saya mana ada lambat'. Encik Suhaimi terus berkata 'Mau gaduh ke'? Saya jawab 'Kenapa nak bergaduh, kamu boskan'? Encik Suhaimi terus tarik leher baju saya dengan kuat dan mengajak sekali saya gaduh. Saya diam sahaja dan merasa takut dia cakap kasar, panggil saya bodoh dan matanya merah. Selepas I

A itu Encik Suhaimi memanggil Encik Muzaimi ke tempat berlaku pertengkaran dan Encik Muzaimi suruh saya beredar dari tempat kejadian untuk mengelak dari berlaku pergaduhan. Saya pergi ke pejabat pengurusan untuk malapurkan apa yang berlaku.

B **[10]** This was the proverbial last straw that broke the camel's back. The first respondent had been given a final warning that he would be dismissed summarily if he showed any form of physical aggression towards his colleagues. He had also been counseled by the manager of the human resource department to refrain from showing any form of physical aggression towards his fellow C workers, bearing in mind he had committed the same offence twice before on two of his colleagues.

[11] On the instruction of the factory manager, the assistant manager of the D human resource department carried out investigation and interviewed a total of ten witnesses with regard to the incident and took their evidence.

[12] A show cause letter dated 10 December 2012 was served on the first respondent in the following terms:

E ... anda telah melakukan kekasaran fizikal kepada Mansur (T0043) dengan melakukan perkara berikut

(a) Mengajak pekerja bawahan tersebut iaitu Mansur (pemandu *forklift*) untuk bergaduh semasa waktu kerja.

F (b) Menarik baju pekerja terbabit dan mengugut dengan niat bagi mencederakannya.

(c) Membuat ugutan yang bertujuan menakutkan pekerja.

(d) Gagal mematuhi peraturan Syarikat 4.08 Procedur.

G

[13] The first respondent replied to the show cause letter, explaining his side of the incident at some length. Amongst others, his explanation was that:

H Apabila dia tidak turun, saya pun memanggil Muzaimi yang ketika itu ada berdekatan dengan tempat saya. Semasa saya memanggil Muzaimi dia pun mengangkat kayu dan masih lagi membebel tidak berhenti-henti seolah-olah membuat kerja secara paksa. Sejurus kemudian Muzaimi datang dan dia berkomunikasi dengan Muzaimi, dan saya nampak Muzaimi memberi isyarat tangan kepadanya seolah-olah menyuruh nya beredar dari situ.

I

[14] The appellant company was not satisfied with the first respondent's explanation and proceeded to serve the notice of domestic inquiry dated 17 December 2012 with the same four charges against the first respondent. However, the domestic inquiry was held in the absence of the first respondent.

A letter of termination dated 25 December 2012 was served on the first respondent based on the four charges.

[15] Dissatisfied with the termination, the first respondent appealed to the management for a re-consideration of his case but was rejected. He then lodged a complaint under s 20 of the Industrial Relations Act 1967, which was referred to the second respondent for adjudication.

[16] Because the domestic inquiry was conducted in such a way that it offended the rules of natural justice, the hearing at the Industrial Court was conducted de novo.

[17] The appellant factory's contention before us was that the learned judge erred in finding that there was impropriety in the judicial making process by the Industrial Court, citing *Multimedia Development Corp Sdn Bhd v Clarence Augustine Tee Teck Huo* [2018] 3 MLJ 447; [2018] 5 CLJ 570.

[18] In allowing the first respondent's application for review, the learned judge found that the Industrial Court was wrong in finding that the first respondent 'bertindak agresif seperti mahu bergaduh'. According to the learned judge, the finding was not supported by the evidence, in particular the evidence of COW2, whose evidence was that both the first respondent and the complainant (COW1) were aggressive and he was not sure who was the more aggressive of the two.

[19] Added to that, COW2 did not know if they were quarreling or were engaged in a normal conversation. The learned judge referred to the following testimony of COW2:

> 13: Anda tak dengar apa yang dikatakan antara Mansur dan Penuntut.
>
> — Tak dengar.
>
> 14: Nampak En Suhaimi lebih agresif. Tak dengar perbualan mereka.
>
> — Ya. Setuju.
>
> 15: En Mansur pun agresif juga.
>
> — Ya Setuju.
>
> 16: Anda nampak sahaja. Anda tak tahu siapa lebih agresif.
>
> — Tak tahu.
>
> 17: Nampak gerakan mulut.
>
> Ya.
>
> ...

26. Tidak ada pergaduhan berlaku yang ada hanyalah perbualan biasa.

— Tak tahu.

[20] The learned judge also referred to the testimony of COW4 who according to her proved that there was no quarrel between the first respondent and the complainant (COW1):

7: Tidak ada pergaduhan berlaku hanya percakapan biasa?

— Setuju

...

10: Ada nampak Penuntut tarik baju Mansur?

— Tak ada.

...

12: Cadangkan tidak ada pergaduhan berlaku?

— Ya.

...

15: Kamu tak dengar Penuntut ajak Mansur untuk bergaduh?

— Setuju.

16: Kamu tak dengar Penuntut ugut Mansur?

— Tak dengar.

17: Tak dengar Penuntut akan mencederakan Mansur?

— Ya.

[21] The learned judge then concluded:

[20] Therefore, I am of the considered opinion that if the Industrial Court had taken into consideration the above evidences of COW2 and COW4, they are not supportive of the evidence on COW1, bearing in mind that the domestic inquiry had rejected the evidence of COW1 at the end of the domestic inquiry in respect of the first charge.

[22] On the question of whether the first respondent had acted aggressively towards the complainant, the learned Industrial Court Chairman found as follows:

19. Isu pertama yang Mahkamah ini perlu putuskan adalah berkaitan dengan kejadian antara penuntut dan COW1 pada 10 December 2012 di tempat kerja mereka.

20. Atas isu ini terdapat saksi isitu COW2. Walaupun dia tidak mendengar apa yang

dikatakan antara COW1 dan penuntut kerana suasana bising di kilang berkenaan, tetapi COW2 nampak penuntut bertindak agresif seperti menarik kolar baju COW1. COW4 yang dipanggil oleh penuntut juga berkata bahawa keadaan antara penuntut dan COW1 adalah tegang dan COW1 seperti tidak berpuas hati.

21. Keterangan dari dua saksi ini adalah lebih menyokong keterangan COW1 yang menyatakan penuntut bertindak agresif, memarahi COW1 dan menarik kolar baju dan tidak menyokong keterangan penuntut yang hanya memohon penjelasan kenapa lambat tetapi ditengking dengan angkuh oleh COW1 lalu penuntut menyentuh baju supaya COW1 turun dari *forklift*.

[23] The learned Industrial Court Chairman had also made the following finding (para 36 of his award):

dalam kes ini kejadian yang berlaku antara penuntut dan COW1 adalah jelas dari segi keterangan. Kejadian ini adalah berpunca dari penuntut dimana dia telah menarik kolar baju COW1 dengan agresif serta memarahi COW1. Penafian oleh penuntut yang kononnya dia hanya menyentuh supaya COW1 turun dari forklift adalah tidak munasabah dan tidak diterima serta tidak selaras dengan saksi-saksi di tempat kejadian dan keterangan keliling yang lain.

[24] It is clear that the learned Industrial Court Chairman accepted the evidence of the complainant (COW1) and rejected the evidence of the first respondent.

[25] On point of principle, it is now settled that the decision of an inferior tribunal is amenable to judicial review where the facts do not justify the decision or where the findings of the Industrial Court are arrived at by taking into consideration irrelevant matters or disregarding relevant matters: *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1; [2010] 8 CLJ 629. In that case, Raus Sharif FCJ (as he then was) delivering the judgment of the Federal Court said:

[15] Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merits of the matter. Thus, the distinction between review and appeal no longer holds.

[26] With due respect to the learned High Court judge, we found no justification for her to interfere with the Industrial Court's finding of fact that the complainant had acted aggressively towards the complainant (COW1) and had pulled his shirt collar. On the evidence before him, the learned Industrial

Court Chairman was perfectly entitled to make such finding.

[27] The finding is not perverse or plainly wrong. Most importantly, having seen and heard the witnesses giving evidence, the Industrial Court Chairman was in the best position compared to the learned judge to assess the credibility and reliability of the witnesses.

[28] It is true that the testimonies of COW2 and COW4 which the learned judge referred to in her grounds of judgment seem to suggest that there was no quarrel between the first respondent and the complainant, but it must be remembered that the area where the incident took place was noisy and the first respondent was seen by COW2 pulling the complainant's (COW1) shirt collar. This is clear evidence of aggression on the part of the first respondent.

[29] The probabilities of the case point to the fact that the first respondent was angry with the complainant (COW1) for not responding to his repeated calls, hence his aggressive behaviour towards the complainant. With due respect, the learned judge was also wrong to take into account the fact that the evidence of the complainant (COW1) was rejected at the domestic inquiry. She should only consider evidence adduced at the Industrial Court proceedings.

[30] The breach of the rules of natural justice at the earlier domestic inquiry (which was held in the absence of the first respondent) is of no consequence as the matter was heard de novo by the Industrial Court. In this regard, this court in *Harianto Effendy Zakaria & Ors v Mahkamah Perusahaan Malaysia & Anor* [2013] 5 CLJ 733 made the following observations at p 737 (CLJ):

> In *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal* [1995] 3 CLJ 344 the Federal Court held that the defect in natural justice by the respondent in that case could and ought to be cured by the inquiry in the Industrial Court. Mohd Azmi bin Hj Kamaruddin FCJ said at p 356:
>
> > The very purpose of the inquiry before the Industrial Court was to give both parties to the dispute an opportunity to be heard irrespective of whether there was a need for the employer to hold a contractual or statutory inquiry. We were confident that the Industrial Court as constituted at present was capable of arriving at fair result by fair means on all matters referred to it. If therefore there had been a procedural breach on natural justice committed by the employer at the initial stage, there was no reason why it could not be cured at the re-hearing by the Industrial Court.

[31] The first respondent by his aggressive behaviour had clearly breached the appellant factory's rules and regulations, on top of the fact that he had been warned not to repeat the offence. In *Jye Tai Precision Industrial (M) Sdn Bhd v Victoria a/p Arulsamy* [2008] 2 MLJ 57; [2008] 1 CLJ 760 this court, inter alia, held as follows:

Here, the respondent was indeed involved in a fight with another employee of the appellant. It does not really matter who started the fight or whether she was provoked into it but the fact remains that she had breached the appellant's rules and regulations by fighting with another employee in the company's car park. Though the respondent had appealed to the appellant's management to be given another chance in view of her long service record, this was turned down when it was discovered that she had been previously warned by her supervisor not to repeat a similar sort of incident. Another reason why her appeal was rejected was because the appellant has a workforce of over 400 where discipline among the workers in the factory must be maintained. Based on these facts we do not detect any irrationality in the Industrial Court award to warrant the High Court to examine the substance of the decision and even if it did, to return a different conclusion from that of the Industrial Court.

[32] As for the issue of punishment, the following observations by this court in another case, *UMW Equipment Sdn Bhd v Parantaman Ramasamy & Anor* [2014] 3 MLJ 457; [2014] 5 CLJ 906 are relevant:

As far as punishment was concerned, the facts showed that this was not the first time that the respondent had been brought before the domestic enquiry for similar misconduct. The first domestic enquiry which was held on 20 April 1998 found the respondent guilty of five charges of misconduct but the appellant decided to give him another opportunity by giving him a final warning that any further act of misconduct and infringement of the appellant's rules and regulations would result in termination of service. The judgment of the Industrial Court shows that the respondent had been issued with warning letters relating to his discipline and punctuality even before the first enquiry was held. Verbal warning had also been given to him in the past. Learned counsel for the appellant submitted that the misconduct which preceded the second enquiry was the proverbial straw that broke the camel's back leaving the appellant with no choice but to terminate his employment upon the respondent being found guilty of the charges against him. Past misconduct is a relevant factor and the Industrial Court, had in the past, taken into consideration in determining whether the punishment is harsh or otherwise (see *Malayan Banking Bhd v Association of Bank Officers, Peninsula Malaysia & Anor* and Industrial Court cases cited in *Kamala Loshanee a/p Ambalavanar v Jaffnese Cooperative Society* [1998] 7 MLJ 61).

[33] It was for all the reasons aforesaid that we allowed the appellant's appeal, set aside the High Court's decision and restored the Industrial Court's award.

Appeal allowed, High Court's decision set aside, IC's award restored.

Reported by Ashok Kumar